No. 1863

In the United States Circuit Court of Appeals

For the Ninth Circuit.

CALIFORNIA FRUIT CANNERS' ASSOCIATION, a corporation,

Plaintiff in Error,

vs.

C. H. LILLY, doing business as C. H. LILLY & Co.,

Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Brief of Defendant in Error.

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ALASKA PRINTING CO., ALASKA BUILDING, SEATTLE

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STATEMENT OF THE CASE.

Action upon an account stated. The instruments creating the obligation are plaintiff's exhibits 1-2-3, copied in its brief on pages 20-21-22; transcript pages 102-5. Concisely stated it is that plaintiff represented to the defendant that it had certain goods on storage in its warehouse for the defendant and that it desired the money for these goods, costs of storage and interest. Defendant, replying, promised to pay the sum and in the same letter disclosed the fact that

his promise to pay was given under a belief that the goods were actually stored for him in plaintiff's warehouse. Subsequently, upon a belief that the goods were not in the warehouse for him, never had been segregated in any manner, labeled, boxed or in fact canned, defendant failed to pay and this suit resulted.

Upon receiving the complaint which alleges an account stated in writing, the defendant demanded copies of the instruments, which were furnished. These thus became a part of the pleadings under our practice.

Plaintiff took the depositions in California of three witnesses—S. L. Goldstein, vice president, and one McMillan and Bentley. By these he identified the exhibits 1, 2 and 3; proved the sending of the exhibit 2 to the defendant and receipt of his letter, No. 3; and that no items had been paid for. He also explained some of the abbreviations on the account.

Upon cross-examination of Goldstein defendant asked as to the meaning of certain other abbreviations on the account, viz., "Mdse., W. H., a/c," and elicited from him that it was a representation to defendant that plaintiff had that merchandise in its warehouse belonging to him. The witness upon his direct examination testified that these were the representations made in writing to defendant which elicited his promise to pay, he was also asked by the

defendant questions to the general tenor as to whether those representations he himself had made were in fact true or false. This evidence was objected to as not proper cross-examination. These depositions contain all the evidence introduced. The cross-examination was not introduced until after the plaintiff had introduced the exhibits in evidence. At close of the case the defendant moved for non-suit, which was granted, and this Writ of Error subsequently sued out.

Plaintiff relies upon the following points for a reversal:

1st. An account was stated between the parties.

2d. A *prima facie* case was made when the plaintiff proved the sending of the account and defendant's acquiescence.

3rd. The gist of the action is this acquiescence in the account.

4th. Error in admitting the cross-examination referred to.

5th. This error was prejudicial and necessitates reversal.

6th. In any event this cross-examination should be disregarded because addressed to no issue.

7th. Plaintiff's evidence establishes a *prima facie* case.

8th. Error in requiring plaintiff to elect between his causes of action.

ARGUMENT.

In replying to plaintiff's contention we shall take up the points discussed by him in the above order:

I.

Do the facts disclose an account stated?

We have no quarrel with the law quoted by plaintiff hereunder on pages 22-3-4-5 of his brief. The authorities quoted announce a primary proposition well established. We are not prepared, however, to admit that they lead to the conclusion that the facts of this case disclose an account stated.

The first authority cited is 1 Am. & Eng. Enc. of Law & Practice, p. 688:

"An account stated is an agreement between parties *who have had previous transactions of a monetary character,* that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, expressed or implied, for the payment of such balance."

It thus appears from his own authority, which is abundantly supported, that one of the elements of a stated account is a "previous transaction."

In *Truman vs. Owens,* 17 Ore. 523, goods were sold to the defendant and delivered and at the same time a statement of account showing the price. No objection was made to the bill as rendered. Court held that this could not show any accounting between the parties, but what was done was a part of and in fulfillment of the original contract—a part of the original contract itself.

Powers vs. Ins. Co., 68 Vt. 390.

Quincey vs. White, 63 N. Y. 370.

Field vs. Knapp, 108 N. Y. 87.

Austin vs. Wilson, 11 N. Y. Supp. 505.

Callahan vs. O'Rourke, 45 N. Y. Supp. 764.

Stevens vs. Tuller, 4 Mich. 387.

Tams vs. Sills (Canadian) 29 U. C. Q. B. 497.

2 Greenl. Ev., Sec. 126.

In *Zaccarino vs. Pallotti,* 49 Conn. 36, the court says:

"Authorities on this subject might be cited to any extent."

Vol. 1 Am. & Eng. Enc. of Law, p. 440, lays down the same doctrine with numerous authorities.

In *Austin vs. Wilson, supra,* it is held that an account stated cannot be made the instrument *per se* to create liability.

The necessity of having prior transaction an element of a stated account is readily seen when the

philosophy creating the principle of account stated is considered. It is simply the striking of a balance between debtor and creditor. The relation of debtor and creditor must have been in existence and that liability is then merged into or rather subrogated to a new promise, based upon the prior subsisting legal liability or upon a moral obligation arising out of a legal liability.

How there can be an examination mutually of accounts and the agreement as to balance due is hard for us to see unless there have been prior transactions between the parties. And a possibility of a mutual examination, at least, is essential.

Reinhart vs. Hines, 51 Miss. 344.
Lockwood vs. Thorne, 18 N. Y. 288.
Bussy vs. Gant, 10 Hump. (Tenn.) 241.

The action of stated account was not introduced into our law for the purpose of superseding the action in assumpsit for goods, wares and merchandise sold or upon the contract to purchase.

Now it is true that in this case the defendant filed affirmative defenses, after denying account stated, setting up previous transactions concerning these goods, but the plaintiff filed a reply denying all the allegations in the affirmative defenses. So the court will take notice that the plaintiff denies the only

allegation of any prior transactions. Where, then, is the proof? The only evidence is that plaintiff said to defendant, "You owe me nineteen thousand dollars for goods of yours I have in my warehouse." Defendant says: "I'll pay you that money for the goods of mine you have in your warehouse." Clearly nothing to show any prior transactions; nothing by which any mutual examination of accounts can be made. Evidently 'tis a promise to pay conditional upon his goods being in the warehouse.

The only proof in this case of liability is the stated account itself; instead of the relation of debtor and creditor existing between the parties on the 29th day of April, 1908, the reply denies all facts from which such conclusion could be drawn. An account stated cannot *per se* be made the basis of a liability. If it could a man could telegraph your Honors that you owed him two hundred dollars for a horse of yours in his stable and if you failed to reply hold you upon an account stated.

II.

Did the plaintiff establish a prima facie case?

The question is discussed by the plaintiff under the assumption that there was no cross-examination or rather without considering it, for they admit on page 45 of their brief Goldstein's cross-examination

amounts to an affirmative defense to the action. (See paragraph 3, page 45, plaintiff's brief.) We shall also discuss this point as if the cross-examination had not taken place.

In his argument hereunder we think counsel misapprehends the issues raised by the pleadings. His complaint alleges account stated. We deny it. We plead facts showing prior transactions, and that he procured our promise to pay the $19,000 by falsely representing that he had goods of ours to that value in his warehouse. This defense he denies *in toto.* The burden is therefore upon him to prove all elements necessary to establish a stated account. His only effort is to do so by introducing his representations to us that he had goods of ours in storage upon which there was due him $19,000, and our promise to pay $19,000 for the goods in storage for us. Nothing to show that it is not a primary transaction; facts showing that there could be no mutual examinaton of accounts; facts showing that the defendant could not possibly know whether the representations were true or false; facts showing that the only promise the defendant could have made was conditional upon the goods being in the warehouse. Plaintiffs admit on page 26 that it is necessary to show prior transaction of a monetary nature but claim that the sending of exhibit No. 2 shows that. Does it? How does it

show that any more than it shows this to be the original transaction? In other words, liability can arise from an account stated *per se.* Yet the authorities are that it cannot. If this promise to pay were a negotiable note, the mere introduction of the note would make a *prima facie* case because the law would presume a consideration. But such is not this case. We rather think that an analogous case to the one at bar is this:

A telegraphs B that he has purchased for him 1000 head of cattle at $25 and asks for the $25,000. B replies he will pay it for the cattle. Can A maintain an action upon account stated? I rather think it is upon contract between them for A to purchase. He must prove the contract, the purchase and tender of cattle. The promise to pay is certainly conditional upon the fact of purchase. To hold it to be a stated account we should have to hold that B admitted that A had purchased the cattle, etc. This is something the facts show he could not have known. Hence the necessity of the law requiring previous transactions of a monetary nature. In such cases the defendant always has had an opportunity of ascertaining the correctness of the consideration passing to him for his agreement.

The Am. & Eng. Enc. of Law says that the circumstances must be such that it can be concluded that the correctness of the statements has been admitted.

III.

The Gist of the Action is the acquiescence in the account.

It is no doubt true that the gist of the action of account stated is the admission of defendant that the statements are correct. This fact does not destroy but rather lends force to the necessity for the law making previous transactions an element of such an action, for without them there is no consideration for such an admission.

IV.

Was error committed in admitting the cross-examination of S. L. Goldstein?

We claim the evidence was properly admitted:

1st. Because Goldstein had testified on his direct examination that he sent the statement to the defendant; that is that he made those representations to Lilly and it was they which elicited the defendant's promise to pay. In other words, that the consideration for the promise to pay was the truth of those statements. Having thus testified in effect as to what was the consideration for the promise sued on, we think the defendant had a right to follow on the cross. However, if we are in error in this, still we submit:

2d. That where false and fraudulent representations are alleged as an inducement to a contract, the law gives the widest latitude in both the direct and cross-examination of witnesses. The strict rules of evidence are in such cases relaxed. If we err in this contention also, still we submit:

3rd. That where the reason for a rule fails, the rule falls. And the reason for the rule contended for by plaintiff is as stated in his brief, on page 35: "But in the Federal Courts the line of demarcation which limits a rightful cross-examination is clear and well defined, and it rests upon the reason to which attention has been called." That is, "if the cross-examiner would investigate these subjects by the testimony of the witness, he may and he must make him his own witness, and stand sponsor for the truth of his statements." This is not the rule in this state so far as the evidence of the principals is concerned. Our statute after providing for the examination of the principal to an action by his opponent either upon deposition, interrogatories, or at the trial, section 1229 B. & R., 6012 Ballinger, provides that such testimony may be rebutted by adverse testimony. If, however, we are wrong in this contention, still we submit:

4th. It was proper as tending to question the veracity of the witness. He had testified that he

had made the statements to the defendant and if they were not true it would at least tend to discredit his veracity in the minds of the jury. If, however, we are in error in this contention, still we submit:

5th. That there is no conflict between the authorities cited by counsel on this point on pages 34 to 44 of his brief, and the ruling of the court. And that wherever they meet the facts in this case they hold that it was proper cross-examination.

The case of *Dick vs. Zimmerman,* 207 Ill. 636, is the case nearest in point and is quoted at length on page 28 of plaintiff's brief. This was an action upon an account stated. Plaintiff testified that at request of defendant he had submitted to him an account of their past dealings; had had several interviews concerning the matters; letters had passed between them and that after an examination the defendant had conceded it to be correct and promised to pay it. Upon cross-examination the defendant attempted to go into the separate items of account. The Supreme Court held he *might properly cross-examine concerning the interviews and letters* that brought about the stated account but not go into the separate items. That is our case. The witness testified, "I wrote this letter and enclosed this account." (Exhibit 2.) Now we did not question him as to what items of merchandise composed the account,

nor as to the cost of the items, nor anything concerning the items that made up the account. We did, however, ask him about the representations he made to the defendant. Surely the law is the same if the representations be made in writing as it is if they be made in interviews. Suppose he had sent him the account showing the items and another writing saying we hold these goods in storage for you? These statements that the goods are in storage are not the items of the account. They are the same as the interviews that brought about the stated account in the Dick case, and under that authority are proper subjects of cross-examination after witness had testified that he had made them.

Counsel for plaintiff consumes ten pages in quoting authorities all to the effect that in a suit upon a promissory note, where the witness swears as to the signature and ownership of the note, that he cannot be cross-examined as to the consideration. This is so well-established as to be fundamental and Judge Donworth never held to the contrary. It is not applicable to this case at all.

The only two cases not upon notes are the Dick case, *supra,* which we claim is in our favor, and the case of *McCrea vs. Parsons,* 112 Federal 917. This case is easily distinguishable from the case at bar. In that case the cross-examiner endeavored to open

up the separate items that composed the account. There was no evidence concerning any representations being made as an inducement to the promise to pay or acquiescence in its correctness. Neither did the cross-examination concern any representation. In this case at bar, we reiterate that we never attempted to touch upon the items that compose the account. If the account was stated those items are dead—they are settled by the promise to pay. For instance, the exhibit No. 2 has, "Nov 1, Mdse., W. H., a/c $6000." We never asked as to what Mdse., as to the separate price, as to how much, as to quality, etc. Not at all. We never touched upon the items. He testified, however, on his direct, that he sent that exhibit to the defendant and that answering it the defendant promised to pay.

Now that exhibit contains some other information from the witness to the defendants extraneous to the items, viz., "W. H., a/c." What does it mean? He testifies in effect it means he told the defendant thereby that the goods were all in plaintiff's warehouse in storage for defendant. It is the same as statements made in the interviews and letters referred to in the Dick case, *supra*. It is not an item of the account. It is a representation which witness said he sent the defendant and having so opened the door for us we were entitled to enter.

V.

If the admission of the cross-examination was error, was it prejudicial?

We respectfully submit that even conceding the cross examination to be erroneous, its admission at that time was in no way prejudicial, for the following reasons:

1. Under our statute as we have cited above we could have made this man our witness and not have been bound by his testimony. If therefore the court had sustained the objection on the ground that it was not a proper cross-examination, we should have asked leave to make him our witness at that time and have propounded the same question to him. We could readily have done so because even had its answers been to the opposite effect to what they are now we could have rebutted such evidence and would not have been bound by it. However the answers were given in depositions, and had the court sustained the objection as not a proper cross-examination, then we should have offered the cross-examination as our direct evidence which we have a right to do in this state. Thus it will be seen that to have sustained the objection would not have availed the plaintiff in any manner.

2. It is self-evident that to reverse the case for this reason would be futile, because under the law of

this state, not being bound by the witness's testimony, upon the re-trial we would make him our witness and he would necessarily be compelled to testify to the same fact, and counsel has admitted that this testimony is fatal to their case. Thus a reversal would be merely the encroachment upon the time of the court without the possibility of it aiding the plaintiff.

VI.

Was this cross-examination directed to any issue in the case?

When counsel makes the contention that the evidence should be disregarded in any event because immaterial to the issues, it seems to us that such position conflicts with his main contention. In one position he contends that the admission of evidence was erroneous and prejudicial to his rights so as to require a reversal, and now he assumes the position that it is not material evidence. We consider it directly within the issues. Counsel's argument is that it would be within the issues had we plead a mistake in agreeing to the act. There is a vital difference in our opinion between a mistake and a fraud. Had we plead a mistake, we doubt whether the evidence would be admissible, because in our estimation it shows a fraud rather than a mistake. To illustrate:

If I stay in-doors and some one comes in today and in talking to me tells me that it has rained and then tomorrow I meet a friend and in our talk I state to him that it rained yesterday, it is a mere mistake upon my part, provided the statement is not true. If, however, instead of being confined, I was out in the open and thus knew that it did not rain and with such knowledge state that it did rain, such statement cannot be called a mistake. It is a direct falsehood and if by stating it I gained a pecuniary advantage, such pecuniary advantage is gained through a fraud and not through a mistake. So the evidence shows in this case.

The plaintiff secured our promise upon the representation that goods were in storage, necessarily knowing that the statement was false and this evidence shows that it was false. If such is the case, then the effect of the statement being to secure a pecuniary advantage is in the eyes of the law a fraud and not a mere mistake.

VII.

Did the plaintiff's evidence establish a prima facie case?

This question, we have heretofore argued, our contention being:

1. That it does not in law show a stated account.

2. That the cross-examination being proper it was fatal to plaintiff's recovery even if the exhibit introduced established a stated account.

VIII.

Was the order requiring the plaintiff to elect between his causes of action error?

Counsel's argument in this behalf seems to be dependent entirely upon the local statute; and again that the law of this locality will control in the Federal Court. We guess there is no question about the fact that the local law will be enforced in this case. That there is any local statute, however, authorizing a party to sue for goods, wares and merchandise sold, and in the same suit, as another cause of action, to sue upon an account stated for the same transaction, we do deny most emphatically. The statute quoted will allow a plaintiff bringing a suit against a defendant upon a contract to settle all of the differences between the same parties which may arise also upon contract. Each cause of action, however, must at the time of bringing the complaint be in existence. As we understand, a stated account and liability for goods sold, like the causes of action first sued on, cannot be in existence at the same time. Where goods

are sold and an accounting is had between the parties concerning it, and the balance is struck and admitted, the latter becomes a stated account and the first dies; it is no longer in existence. It seems absurd to say that the stated account can exist and at the same time the liability for the goods, wares and merchandise sold. The only consideration that the stated account can possibly have is the prior liability, and if the stated account exists the prior liability must have ceased to exist—must have become merged, as it were, into the liability under a stated account. For instance, if counsel's contention in this regard is true, then, if I should go to the plaintiff and purchase $19,000.00 worth of goods and should afterwards give my note for the purchase money, they could sue me for goods, wares and merchandise sold $19,000.00 and upon the promissory note for $19,000.00. Yet it is self-evident that if the action for merchandise sold exists, then there is no liability under the note. And if the liability under the note exists, the liability for merchandise sold has ceased to exist. In other words, our contention in this regard is that for every cause of action sued on in a complaint the separate causes of action must be founded upon distinct liabilities. The plaintiff will not be allowed to go fishing for a judgment. And in this case it might be well to remark that it was admitted before Judge Hanford when the motion was argued that the stated ac-

count grew out of and was the same transaction as the first cause of action.

Another idea that we would bring to the minds of the court in this regard is the fact that if the court will consider what would have doubtless occurred on the trial under such a complaint it would readily see that the defendant would be placed in a peculiar predicament. For instance, if we should offer evidence to show that the goods were not of the quality, or that the right price was not charged, the plaintiff would object upon the ground that it was immaterial, because there was a stated account, and if there was a stated account it precluded us from inquiring into those matters. Again, if we had directed our defense towards showing that there was no stated account, the plaintiff could contend that he could still recover under the first count. In other words, the result would be that the court would necessarily have to instruct the jury that if they should find that there was a stated account, then all the evidence concerning the quality, kind, price, etc., of the goods would be absolutely immaterial, and if they should find that there was no stated account, then they might find for the plaintiff upon the first count. In other words, he would, in effect, say to the jury that the plaintiff considers that he has a right of action against the defendant and he has plead all the causes of action

which he thinks will make the defendant liable, and that if one does not exist they have a right to say that the other does. In short, that a litigant may go fishing.

Our statute simply means that if I purchase goods from the defendant for $100.00, giving them my note for that amount and again purchase more goods and give them another note in payment for the second purchase, and again become indebted to them on open account and pay them nothing, then in one suit they may sue me upon the three causes of action. First cause, upon the first note. Second cause, upon the second note; and third cause, for the open account. Thus all of the liabilities are independent, separate and distinct.

We respectfully submit that neither the statute of our state nor of any other state permits a party to sue upon the same liability in several different causes of action.

Another point that we desire to call the court's attention to is that in any event the plaintiff was not injured by this ruling, because to recover upon the open account he would also have been compelled to show delivery of the goods, which is contrary to the fact.

In conclusion, we respectfully submit that the rulings of the court were in all respects proper, and that, in any event, it would be a mere waste of time to order a new trial, for under no theory of the case can the plaintiff recover.

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